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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 20

HUGH A. VOSS, DEPUTY COMMISSIONER, BUREAU OF EMPLOYEES' COMPENSATION, U.S. DEPARTMENT OF LABOR, FOR THE EIGHTH COMPENSATION DISTRICT, PETITIONER

v.

CHARLES ZICHER AND B. D. HASSIE, D/B/A SOUTHERN STEVEDORING & CONTRACTING COMPANY, AND TEXAS EMPLOYERS' INSURANCE ASSOCIATION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the United States District Court for the Southern District of Texas (R. 227-233) is reported at 101 F. Supp. 963. The opinion of the United States Court of Appeals for the Fifth Circuit (R. 241-249) is reported at 200 F. 2d 724.

JURISDICTION

The judgment of the Court of Appeals was entered on December 17, 1952 (R. 249). The petition for a writ of certiorari was filed on March 16, 1953, and was granted on May 18, 1953. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

An illiterate longshoreman was injured in the course of his employment. Although no written notice was afforded the employer within thirty days, the foreman in charge of the longshoremen was immediately informed of the injury. The questions presented are:

1. Whether the foreman's knowledge of the injury constituted knowledge on the part of "the employer (or his agent in charge of the business in the place where the injury occurred)" within the meaning of Section 12 (d) (1) of the Longshoremen's and Harbor Workers' Compensation Act, providing for circumstances in which failure to give written notice is not a bar to a claim.

2. Whether the deputy commissioner abused his discretion in excusing, pursuant to Section 12 (d) (2) of the Act, the submission of written notice of injury on the ground that "for some satisfactory reason such notice could not be given."

STATUTE INVOLVED

Section 12 of the Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1424, 1431, 33 U.S.C. 912, provides as follows:

(a) Notice of an injury or death in respect of which compensation is payable under this Act shall be given within thirty days after the date of such injury or death (1) to the deputy commissioner in the compensation district in which such injury occurred and (2) to the employer.

(b) Such notice shall be in writing, shall contain the name and address of the employee and a statement of the time, place, nature, and cause of the injury or death, and shall be signed by the employee or by some person on his behalf, or in case of death, by any person claiming to be entitled to compensation for such death or by a person on his behalf.

(c) Notice shall be given to the deputy commissioner by delivering it to him or sending it by mail addressed to his office, and to the employer by delivering it to him or by sending it by mail addressed to him at his last known place of business. If the employer is a partnership, such notice may be given to any partner, or if a corporation, such notice may be given to any agent or officer thereof upon whom legal process may be served or who is in charge of the business in the place where the injury occurred.

(d) Failure to give such notice shall not bar any claim under this Act (1) if the employer (or his agent in charge of the business in the place where the injury occurred) or the carrier had knowledge of the injury or death and the deputy commissioner determines that the employer or carrier has not been prejudiced

by failure to give such notice, or (2) if the deputy commissioner excuses such failure on the ground that for some satisfactory reason such notice could not be given; nor unless objection to such failure is raised before the deputy commissioner at the first hearing of a claim for compensation in respect of such injury or death.

STATEMENT

This action was brought to enjoin the enforcement of an award of compensation entered by petitioner Hugh A. Voris, Deputy Commissioner, Bureau of Employees Compensation, for the Eighth Compensation District, pursuant to the provisions of the Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1424, 33 U.S.C. 901 *et seq.*[1] The pertinent facts may be summarized as follows.

On December 19, 1949, one Earl Porter was employed by respondents Charles Eikel and B. D. Harris, a partnership doing business as Southern Stevedoring and Contracting Company, as a longshoreman in connection with the unloading of the SS *Southern States* at Texas City, Texas (R. 65-67, 178). While aboard that vessel in the performance of his duties, Porter was injured when he fell onto dunnage in his efforts to avoid the consequences of a flash fire that had broken out in the hold (R. 55,

[1] Section 21 (b) of the Act (33 U.S.C. 921 (b)) provides that an injunction proceeding in a district court shall be the manner of obtaining judicial review of compensation orders, and that an order may be set aside "if not in accordance with law." The scope of review is that of the Administrative Procedure Act. *O'Leary* v. *Brown-Pacific-Maxon*, 340 U.S. 504.

67). On August 24, 1960, he filed a formal claim for compensation under the Longshoremen's and Harbor Workers' Compensation Act (R. 63, 121-123). Respondent employer and its insurance carrier, respondent Texas Employers' Insurance Association, filed an answer containing a specific denial that notice of injury was provided within the period stipulated by Section 12 (a) of the Act (R. 7).

On September 19 and November 10, 1960, formal hearings were conducted by the deputy commissioner (R. 62, 125).[2] The evidence adduced at these hearings showed, in relevant part, the following: The claimant Porter was illiterate to the extent that he could barely write his own name (R. 88). He had never been employed as a longshoreman before (R. 82), and had worked on this job for only one day prior to the accident (R. 86). He knew very few of his fellow longshoremen on the job (R. 117), and didn't know who his employer was until he received his pay check a week later (R. 92-93). After the accident, the claimant did not give written notice to his employer, but did report the injury to two supervisory employees, Leslie Lovely and Ernest Wisby (R. 123, 126). Lovely was the immediate foreman of the gang of longshoremen to which claimant had been assigned (R. 135). Wisby was performing the duties of the so-called "walking foreman" (R. 127). In

[2] For the purposes of the administration of the Act, the Bureau of Employees' Compensation has created fifteen districts. 20 C.F.R. §§ 31.1, 31.2. Petitioner is the deputy commissioner in charge of the eighth district.

that capacity he had charge of both of the longshoremen gangs that were working aboard the vessel and exercised general supervision over their performance (R. 127, 128, 134). In addition, Wisby had hired the claimant (and presumably the other longshoremen), and was responsible for paying off the men out of funds supplied for that purpose by the employer (R. 87, 124, 191). After being informed of the injury, Wisby, following the customary, accepted practice in cases of personal injury (R. 151, 152-153, 159-160, 196), gave notice to the employer's "timekeeper," whose own duty it was to make out an injury report and to procure medical assistance if such was needed (R. 131, 152, 187).[4]

On these facts, the deputy commissioner found that the notice provisions contained in Section 12 of the Longshoremen's Act had been satisfied and, based on this and other findings, on November 20, 1950, entered an order directing compensation to claimant (R. 64-65).

On December 5, 1950, respondents filed a complaint in the United States District Court for the

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[4] The timekeeper denied that he had been told of the injury (R. 152). But as the District Court recognized, the customary testimony of the "trade witness" would probably be sufficient in support of the deputy commissioner's finding that the timekeeper had notice of the injury (R. 200). It is, of course, the function of the deputy commissioner to resolve conflicts in the evidence. *Crowell v. Benson*, 285 U.S. 22.

[4] There was evidence, in addition, that Wisby had taken Porter home from the accident (R. 96; 98-99, 120); that he told Porter he would take him to a doctor, but didn't (R. 98, 92); and that several days after the accident Porter reminded Wisby of the accident and his injury (R. 71-72, 91).

Southern District of Texas to enjoin the enforcement of the award (R. 4-15). One of the grounds asserted was that there was no evidence to sustain the finding as to notice (R. 9). On motion of the deputy commissioner, the case was remanded to him on March 8, 1951, for additional findings of fact (R. 21-22). On March 16, 1951, an amended compensation order was entered, which made these specific findings pertaining to notice (R. 23-24):

That written notice of injury was not given within thirty days as provided by Section 12 (a) of the Longshoremen's and Harbor Workers' Compensation Act, but that the employer or agent of the employer had knowledge of the injury at the time it occurred; that the employer has not been prejudiced by the failure to give written notice of injury within thirty days as provided by Section 12 (a) of the Act; that the employer has not filed a controversion of the claim as provided by Section 14 (d) of the Act; that the employer has not paid compensation for temporary total disability in accordance with Section 14 (b) of the Act; that the employer has not furnished medical treatment in accordance with Section 7 of the Act; that the employer has not furnished the claimant with a form for the purpose of making claim for compensation as provided by Section 12 (b) of the Act; that the employer has not filed a report of the alleged injury with the deputy commissioner in charge of the district in which the injury occurred as provided by Section 30 (a) of the Act; that the employer has not filed a report of the payments made to the claimant as provided by Section 30 (c) of the Act; that the claimant is a longshoreman as defined by the Act; that he is unable to read and only writes his name with difficulty; that he was not a regular longshoreman and had only worked as a longshoreman one eight point in the date of his injury, and was not acquainted with the requirements as to reporting an injury; that he was not given any instructions as to whom

[redacted]

applied to the facts of this case, these principles clearly justify the findings of the deputy commissioner. For the claimant, an illiterate, casual longshoreman, followed the accepted practice and immediately notified his gang and his walking

foreman of the injury. The latter, in turn, notified the timekeeper, whose assigned duty it was to record the injury and process medical assistance. Admittedly, had the walking foreman and timekeeper fulfilled their assigned duty, the employer would obviously have been given the opportunity to conduct an investigation into the facts of the accident and to provide medical attention.

B. Even if the employee's immediate supervisor is not "the agent in charge of the business in the place where the injury occurred", the requirements of Section 12(d) (1) are met if he knows that the injury has occurred. Under familiar principles of agency, this knowledge is imputable to the employer or to his "agent in charge." In holding notice to the foreman to satisfy the relevant provisions of the particular workmen's compensation act, those state courts which do not determine the foreman to be the employer's "agent" or "representative" reach the same result by means of imputation. The consistent administrative practice under the Longshoremen's Act, heretofore unchallenged, accords with the determination of the deputy commissioner that the employer had knowledge of the injury.

C. The deputy commissioner's finding that the employer was not prejudiced by the absence of timely written notice is fully substantiated by the record. There is nothing to suggest that, had written notice been submitted, the employer's opportunities to investigate the circumstances of the injury would have been any greater than if the super-

visory employees with knowledge that an injury had occurred had carried out their responsibilities properly. Further, the record will at least support the inference that, had the employer been personally informed of the injury, respondents' ability to defend against the claim at the compensation hearing would not have been improved.

II.

Section 12(d) (2) of the Longshoremen's Act conveys broad discretion upon the deputy commissioner to excuse written notice on the ground that "for some satisfactory reason such notice could not be given". The deputy commissioner did not abuse that discretion here. The reasons that he assigned in excusing notice, when taken as a whole, make it plain that by informing his foreman that he had been injured claimant did everything that could reasonably have been expected of him.

ARGUMENT

Section 12(a) of the Longshoremen's and Harbor Workers' Compensation Act stipulates that notice of an injury or death (compensable under the Act), containing the name and address of the employee, the time, place, nature and cause of the injury, shall be given within thirty days after the occurrence to the deputy commissioner and to the employer. Section 12(d) provides that the failure to give such notice (which by virtue of Section 12(b) must be in writing) shall not bar a claim for compensation (1) if the employer or "his agent in charge of the business in the place where the in-

jury occurred" knows of the injury and the deputy commissioner determines that the employer has not been prejudiced by the absence of written notice, or (2) if the deputy commissioner excuses the failure on the ground that for some satisfactory reason written notice could not have been given.

The claimant here, an illiterate longshoreman, concededly did not give written notice of his injury within the statutory period. He did, however, give oral notice, shortly after having been injured, both to his immediate foreman and to the general foreman in charge of the longshoremen gang employed aboard the vessel at the time, and this information was relayed to the timekeeper. The deputy commissioner deemed this to constitute knowledge on the part of the "agent [of the employer] in charge of the business in the place where the injury occurred" and, determining that respondents had not been prejudiced by the absence of written notice, held that the claim was not barred. Further, and as an independent matter, the deputy commissioner excused the lack of written notice, setting forth in the amended compensation order numerous reasons, satisfactory to him, why such notice "could not be given."

The court below held that neither subsection of Section 12(d) could be invoked in the circumstances of the case and that, as a consequence, the amended compensation order was properly enjoined by the district court.* In so doing, the court

*The district court also held that certain medical reports were improperly received as they were hearsay and did not afford respondents the right of cross-examination. Assuming that the deputy commissioner had relied exclusively upon these

has invalidated a long standing administrative construction of Section 12(d)(1) which is fully in accord with the reading given throughout the country to comparable provisions in state compensation statutes. In addition, the court's decision strips the deputy commissioner of that discretion, conferred upon him by Section 12(d)(2), which is an essential feature of legislation of this character.

I

The Knowledge of the Foreman Wisby that Claimant Had Been Injured Constituted Knowledge on the Part of the "Employer (or His Agent in Charge of the Business in the Place Where the Injury Occurred)" Within the Meaning of Section 12 (d) (1) of the Longshoremen's Act and the Employer Was Not Prejudiced by the Absence of Timely Written Notice.

A. *The Term "Agent in Charge of the Business in the Place Where the Injury Occurred" in Section 12(d)(1) Has Reference to the Individual Who, on the Employer's Behalf, Directs the Employee in His Work.*

The deputy commissioner's express finding, that the employer's "agent in charge of the business in the place where the injury occurred" had knowl-

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reports for his findings of fact as to the nature of the claimant's condition and the extent of his disability, the court was of the opinion that this action of the deputy commissioner, standing alone, would require that the matter be referred back to him for further proceedings. The court also expressed "considerable doubt" as to whether the evidence warranted the finding of the deputy commissioner as to the claimant's wage rate, but found it unnecessary to decide this question. (R. 232-233.) The Court of Appeals did not reach either issue. Inasmuch as the petition for a writ of certiorari sought review

edge of the injury to the claimant, was based upon the undisputed testimony of the walking foreman Wisby that, shortly after the flash fire occurred in the hold of the S.S. *Southern States*, claimant reported to him that he had been hurt (R. 128-129). As walking foreman, Wisby was in charge of all of the longshoremen working aboard the vessel. Not only did he direct them in the performance of their work (R. 127, 182, 194) but, in addition, he had hired claimant, and presumably the other longshoremen as well, and was charged with the duty of paying them off on behalf of the employer (R. 67, 184, 191). Moreover, while the responsibility for making out injury reports and procuring medical assistance, when necessary, was placed by the employer upon the timekeeper (R. 131, 182, 187), it was customary for an injured longshoreman to report an accident to his immediate foreman and the walking foreman (R. 131), both of whom were notified here. The latter would then either dispatch the employee to the timekeeper or, as Wisby did in this instance, himself pass on the information (R. 131).

(1) This finding—that in these circumstances the failure to give notice did not bar the claim—was in complete accord with the objective of the Longshoremen's Act in general and with its notice

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only of the question of the adequacy of the notice, we doubt that either of these matters is properly before this Court. In the event, therefore, that this Court should hold that the notice given here was in conformance with the statute, the proper disposition of this case would appear to be to remand to the district court or to the deputy commissioner for further findings.

provisions in particular.[1] The requirement that notice of the injury be afforded the employer—part of the statutory scheme of virtually all workmen's compensation acts (see *infra*, pp. 22-25)—is not designed to place formalistic obstacles in the path of recovery, so as to deprive the unwary employee and his family of the compensation which is an economic necessity in the event of such injury. Instead, as respondents themselves recognize, the notice provisions stem from the belief that in order to obviate the possibility of fictitious claims, as well as to minimize the extent of a *bona fide* compensable injury, the employer must be allowed a timely opportunity to inquire into the facts of the alleged accident and be given an opportunity to provide medical attention if the situation so warrants. Cf. *Matter of Whitmyre* v. *Inter B. M. Corp.*, 267 N.Y. 28, 30, 195 N.E. 539, 540; *Long* v. *Brown*, 64 Ida. 39, 128 P. 2d 754; *Knipe* v. *Skelgas Co.*, 229 Iowa 740, 294 N.W. 880; *Henderson* v. *Consumers Power Co.*, 301 Mich. 564, 4 N.W. 2d 10; *Booth* v. *Texas Employers' Ins. Ass'n*, 132 Tex. 237, 123 S.W. 2d 322; *Finch* v. *Buffalo Envelope Co.*, 218 App. Div. 31, 217 N.Y.S. 744, affirmed, 244 N.Y. 557, 155 N.E. 895; Horovitz, *Injury and Death Under Workmen's Compensation Laws* (1944), p. 247. It is because the notice provisions are meant solely to fulfill this function—and no more—that the Long-

[1] The statutory objective is clearly relevant since the question is one of the meaning to be afforded an ambiguous term (i.e., "agent in charge") and not, as the Court of Appeals thought (R. 243), whether language should be read into the Act. Cf. *Pillsbury* v. *United Engineering Co.*, 342 U.S. 197.

shoremen's Act waives the requirement of written notice in circumstances where the employer or his "agent in charge" has actual knowledge of the injury, for with such knowledge the employer's interests are satisfactorily protected. Insistence upon the submission of written notice, which we understand is rarely given, would have the sole effect of permitting employers and their insurance carriers to evade an obligation which the public interest has placed upon them.[8]

On the other hand, notice to the foreman, if the foreman properly fulfills his function and the duties assigned him by the employer, will inevitably give the employer the opportunity to investigate the circumstances of the accident and to provide medical

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[8] As aptly stated by one state court in relation to a statute waiving written notice if it is determined that the employer was not prejudiced [*Beatty* v. *Chandeysson Elec. Co.*, 236 Mo. App. 866, 879, 190 S.W. 2d 642, 654-55]:

> The fundamental purpose of the Legislature in enacting the Workmen's Compensation Law was, as a matter of public welfare, to place upon industry the losses sustained by workmen and their dependents by reason of injuries and death arising out of and in the course of employment —the theory being that compensation for such losses should be paid by industry rather than to leave the injured employee or his dependents to bear such loss alone.
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> The notice section of the Act * * * was intended to prevent the employer from being imposed upon by stale or fraudulent claims. However, the very exceptions to the requirement of notice to the employer within thirty days * * * show that said section was not intended to be used as a technical legal trap to defeat claims because of failure to give such notice where the evidence shows [good cause or no prejudice].

Cf. Horovitz, *Injury and Death Under Workmen's Compensation Laws* (1944), pp. 252-3; Dodd, *Administration of Workmen's Compensation* (1936), p. 126.

attention if the injury is serious enough to warrant it. And with such opportunity, the employer can prevent the successful presentation of a spurious or exaggerated claim some months after an injury is alleged to have taken place.

Nevertheless, the court below held that the "agent in charge" was the gearman, David, the individual charged with the custody and maintenance of the stevedoring equipment, adding that nothing less than his personal knowledge or that of the employer would suffice (R. 243-244). It attached no significance to the role that the walking foreman played in the conduct of the respondent's business, a result which undoubtedly stemmed from the assertions of the employer and the gearman at the compensation hearing that when the former was not present the latter was in charge (R. 178, 193).*

Such a mechanical equating of the statutory language to the label the employer chooses, perhaps *sub silentio*, to place upon one of his employees rather than another, completely frustrates the salutary aim of a statute which this Court has consistently held "should be construed liberally in furtherance of the purpose for which [it was] enacted and, if possible, to avoid incongruous or harsh

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*Significantly, even the district court refused to accept the employer's designation of someone other than the walking foreman as having the power to procure medical assistance for the injured employee (R. 231-232), thus indicating that it would look into the practicalities and realities of the employment relationship and not permit the employer to avoid his liability in this regard by nominally shifting the titles and responsibilities of his employees. See *infra*, pp. 40-41, n. 31.

results." [10] If "agent in charge" does not here mean the walking foreman Wisby, the statutory substitution of actual knowledge for written notice will become a meaningless and useless alternative.[11] Inasmuch as the foreman directly supervised the longshoremen at their work, and as the employer's representative both hired and paid them, he was undoubtedly the single individual through whom dealings with the employer were to be conducted. The gearman, on his part, had, as far as the record shows, little if any connection with the longshoremen. Not only was he removed from the scene of operations at the time the accident occurred (R. 190), but, also, there is little to suggest that he exercised immediate supervision of the conduct of the enterprise. Certainly there is nothing to suggest that the rank-and-file employees were even aware of his existence. It is not strange that claimant made no effort to inform him personally of the injury; the plain fact is that few, if any, of the longshoremen would have seen the necessity of going beyond the foreman.

The short of the matter is that, under the decision of the court below, not only this claimant, but all claimants similarly situated, will be deprived of compensation, even though free from culpable neglect, and even though they conduct themselves pru-

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[10] *Balt. & Phila. Steamboat Co. v. Norton*, 284 U.S. 408, 414. Cf. *Harbor Marine Contracting Co. v. Lane*, 102 F. 2d 845, 847 (C.A. 2), certiorari denied, 308 U.S. 587; *Travelers Insurance Co. v. Branham*, 126 F. 2d 873, 874 (C.A. 4).

[11] That is true, of course, unless Wisby's knowledge is imputed to the employer (see *infra*, pp. 30-35).

closely as might be reasonably expected of one having suffered an injury in the course of employment. And there will be many employees who are similarly situated. In most of the enterprises covered by the Act[13] an employee whose duties are of a more or less menial character will have little, if any, contact with representatives of the employer other than the supervisor, who has, irrespective of title, direct control over the work being performed. It is this supervisor who normally will learn of a *bona fide* injury, either from the employee or by personal observation, and, where timely written notice has not been given, the sufficiency of his knowledge often will be the determining factor as to whether the employee will receive compensation.

That the person in direct charge of the longshoremen must be considered the "agent in charge" whose knowledge suffices is markedly demonstrated by the circumstances of the instant case. Although respondents characterize the waiting foreman as an "inexperienced and unskilled colored longshoreman" (Br. in Opp. 10), the fact remains that he immediately transmitted his information to the timekeeper. The timekeeper was the very individual charged by the employer with the task of making out injury reports and sending the employee to a physician. It is plainly frivolous to contend, as

[13] The Longshoremen's Act was adopted by Congress as the workmen's compensation statute of the District of Columbia. Act of May 17, 1928, c. 612, § 1, 45 Stat. 600, D.C. Code (1951) § 36-501. In addition, it is applicable at present to civilian employment at military, air, and naval bases outside the United States. Act of August 16, 1941, c. 357, § 1, 55 Stat. 622, as amended, 42 U.S.C. 1651.

respondents do, that there was not the opportunity to look into the occurrence which is afforded them by the statute. Whatever dereliction of duty there may have been on the part of the timekeeper is traceable solely to the employer's failure to place trustworthy individuals in positions carrying with them some measure of responsibility. This is hardly a risk that equitably or within any conceivable statutory purpose can be imposed upon any employee, let alone an illiterate casual laborer such as claimant.

Indeed, although it is unnecessary to go so far, it is clear that any extent to which the walking foreman Wisby may be deemed to fall short of the term, "agent in charge," is amply supplied by the role of the timekeeper. As noted above, it was the accepted and admitted practice on this job for personal injuries to be reported by the injured person or his foreman to the timekeeper, who was charged by the employer with making out the reports and procuring medical assistance. This practice procedure was followed by the claimant. It comes with poor grace for the employer now to argue that the system which he had approved was insufficient to meet the statutory requirements. Whether looked at in terms of a "delegation of authority," "waiver," "estoppel," or, in the language of the statute itself, "agent in charge," it would seem indisputable that the knowledge of the timekeeper, if not the knowledge of the foreman, was an ample substitute for the written notice.

(2) The Longshoremen's Act was intended to be

representative of the best of the state workmen's compensation acts." Nevertheless, the court below has barred a claim for compensation for injury, which, so far as our research has disclosed, would be barred by no state court which has ever decided a similar question of notice.

Forty-three of the state workmen's compensation acts require, as a condition precedent to recovery, that the employee afford notice of his injury to the employer within a stipulated time period.[9] While

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[8] H. Rep. No. 1130, 69th Cong., 1st Sess., p. 2; H. Rep. No. 1767, 69th Cong., 2d Sess., p. 2.

[9] The statutes of North Dakota [N.D. Rev. Code § 65-0501 *et seq.* (1943)]; Ohio [Ohio Gen. Code § 1465-87 *et seq.* (Page, 1937)]; Oregon [Ore. Comp. Laws Ann. § 7-103 *et seq.* (1940)] and West Virginia [W. Va. Code § 2481 *et seq.* (1943)] do not contain notice provisions. Each of these jurisdictions has an exclusive state insurance fund.

Written notice of injury is stipulated in the statutes of the following twenty-eight states: Alabama [Ala. Code tit. 26, § 294 (1940)]; Arkansas [Ark. Stat. Ann. § 81-1327 (1947)]; California [Cal. Labor Code Ann. (Deering, 1937) § 5400]; Delaware [Del. Rev. Code § 1937 (1935)]; Florida [Fla. Stat. Ann. § 440.18 (1944)]; Georgia [Ga. Code Ann. § 114-402 (1936)]; Idaho [Ida. Code § 72-406, 408 (1947)]; Indiana [Ind. Stat. Ann. § 40-1202 (Burns 1940)]; Iowa [Iowa Code Ann. §§ 85.23, 85.24 (1946)]; Kentucky [Ky. Rev. Stat. §§ 342.185, 342.195 (1946)]; Louisiana [La. Rev. Stat. tit. 23, §§ 1291, 1292 (1950)]; Maine [Me. Rev. Stat. c. 26, § 20 (1944)]; Massachusetts [Mass. Gen. Laws ch. 152 §§ 41, 42 (1933)]; Minnesota [Minn. Stat. Ann. § 176.15 (1946)]; Missouri [Mo. Rev. Stat. Ann. § 287.420 (Vernon 1952)]; Montana [Mont. Rev. Code Ann. § 92-607 (1947)]; Nebraska [Neb. Rev. Stat. § 48-133 (1943)]; Nevada [Nev. Comp. Laws § 2718 (Hillyer 1929)]; New Hampshire [N.H. Rev. Laws c. 216 §§ 16, 17 (1942)]; New Mexico [N.M. Stat. Ann. § 57-913 (1949)]; New York [N.Y. Workmen's Compensation Law § 18 (McKinney 1946)]; North Carolina [N.C. Gen. Stat. § 97-22 (1943)]; Oklahoma [Okla. Stat. Ann. tit. 85 § 24 (1936)]; Rhode Island [R.I. Gen. Laws c. 300, art. II, §§ 17, 18 (1938)]; South Carolina [S.C. Code § 72-301 (1952)];

there is some variance in the precise terminology employed, each set contains, in addition, provisions which expressly or by necessary implication " require formal notice, if required at all, [only] where the employer knows that the injury has occurred. And in many instances the statutory class whose knowledge will suffice extended so as to include such persons as the employer's "agent," "representative" and/or "foreman."[a]

South Dakota [S.D. Code] 64.0101 (1939)]; Tennessee [Tenn. Code Ann.] 50-1 [Williams 1950]]; Vermont [Vt. Stat.] 21 sec. 651 (1947)]; Virginia [Va. Code] 65.1-86 (1950)]; Wyoming [Wyo. Comp. Stat.] 72-111 (1945)].

In the remaining jurisdictions, either such provisions [notice to the employer will suffice] or notice is not required. Arizona [Ariz. Comp. Ann. St.] 56] 908 (1939)]; Colorado [Col. Stat. Ann.] 97-10-1 (1935)]; Connecticut [Conn. Gen. Stat.] 7301 (1949)]; Illinois [Ill. Rev. Stat. ch. 48,] 138.8 (1949)]; Kansas [Kan. Gen. Stat. Ann.] 44-520 (1949)]; Kentucky [Ky. Rev. Stat.] 342.200 (1942)]; Maryland [Md. Ann. Code, art. 101,] 37 (1947)]; Michigan [Mich. Stat. Ann.] 17.148 (1950)]; Missouri [Mo. Rev. Stat.] 3689 (1939)]; Pennsylvania [Penn. Stat. Ann.] 77] 431 (1939)]; Texas [Tex. Civ. Stat. Ann. art. 8307] 6 (Vernon 1936)]; Utah [Utah Code Ann.] 42-1-60 (1943)]; Washington [Wash. Rev. Code] 51.28.010 (1951)]; Wisconsin [Wis. Stat.] 102.03 (1949)].

[a] The Alabama and Oklahoma statutes, which expressly provide that knowledge of the employer's agent, under certain circumstances, shall be sufficient, are silent as to whether the employer will be permitted to show lack of prejudice. If the employer has been prejudiced by the agent's failure to give notice, it is unjust to permit the employee to recover. Even if the agent is a supervisory employee, it is unlikely that he is capable of such prejudice. *Kansas Oil Co. v. Sullivan*, 203 Okla. 251, 220 P. 2d 799; *Schweikhart v. Kentucky Engineering Foundation Inc.*, 255 Mo. App. 306, 74 SW 2d 838. Cf. pp. 45-46 *infra*.

[a] "Agent" and/or "Representative": Connecticut, Georgia, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Massachusetts, North Carolina, Rhode Island, South Carolina, South Dakota, Vermont, Virginia.

"Foreman" or "Immediate Supervisor": California, Colorado, Georgia, New Mexico, New York, Utah, Washington.

The notice provision in the Florida statute is identical, in

On numerous occasions, state courts, in construing statutes enabling specific enforcement in an "agent" or "superintendent" but not in a "foreman," have been called upon to decide whether the knowledge of the person having direct charge of the employer's work sufficed. In resolving that question, it has sometimes been deemed unnecessary to reach the question whether the foreman is the employer's "agent" or "superintendent" (see pp. 25, 28 *infra*). But where such a determination has been made, it has universally been to the effect that the foreman is such a person. See, *e.g.*, *Baker & Rogers Construction Co.* v. *Allen*, 153 Ky. 615, 156 S.W. 487; *Hixon's Case*, 79 Mass. 465, 111 N.E. 45; *Simmons' Case*, 117 Me. 176, 103 A. 69; *Van Treese* v. *Travelers Insurance Co.*, 137 Ga. 304, 121 S.E. 815;[27] *Franks* v. *Carpenter*, 152 Iowa 1358, 133 N.W. 647; *Smith* v. *Samuel T. Grisby Marble and Granite Works*, 157 Ia. 502 (C.A. Ia.); *Hydrox Chemical Co.* v. *Industrial Commission*, 291 Ill. 370, 126 N.E. 504.

Respondents do not challenge the soundness of these decisions, but contend instead that they are without significance here. Their view seems to be that the use of the phrase "agent in charge of the business in the place where the injury oc-

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material part, to Section 12 of the Longshoremen's Act; the Montana act refers to a "managing agent or superintendent in charge of the work upon which the injured party was engaged"; and the Wisconsin act provides that knowledge of an officer, manager, or designated representative will suffice. The balance of the state statutes mention solely the employer.

[27] At the time the *Van Treese* case was decided, the Georgia statute made no mention of a "foreman". It was subsequently amended to do so (cf. *supra*, p. 23 n. 16).

capable," rather than merely "agent" or "representative," discloses a Congressional purpose that the knowledge of a foreman be not sufficient to replace written notice. But there is nothing in the legislative history of the Act[9] to support this assertion. While the committee reports offer an explanation of the terminology employed in Section 12(d)(1), they do make it perfectly plain that the Longshoremen's Act was intended simply to be a substitute, insofar as the covered employees are concerned, for state acts, which under decisions of this Court cannot constitutionally be applied to maritime workers.[10]

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[9] See 67 Cong. Rec. 4118, 4908, 4914; 68 Cong. Rec. 4402, 4404-4405; S. Rept. No. 973, 69th Cong., 1st Sess.; H. Rept. No. 1767, 69th Cong., 1st Sess.; H. Rept. No. 1190, 69th Cong., 1st Sess.; Hearings, House Committee on the Judiciary, on S. 3170, 69th Cong., 1st Sess., March 19 and April 2, 1926; Hearings, House Committee on the Judiciary, on S. 3170, 69th Cong., 1st Sess., June 22, 1926.

[10] Southern Pacific Co. v. Jensen, 244 U.S. 205; Knickerbocker Ice Co. v. Stewart, 253 U.S. 149; Washington v. Dawson & Co., 264 U.S. 219.

"The bill as amended . . . will enable Congress to discharge its obligation to the maritime workers placed under their jurisdiction by the Constitution of the United States by providing for them a law whereby they may receive the benefit of workmen's compensation and thus afford them the same remedies that have been provided by legislation for those killed or injured in the course of their employment in nearly every State in the Union." H. Rept. No. 1767, 69th Cong., 1st Sess., p. 2. See also S. Rept. No. 973, 69th Cong., 1st Sess., p. 2.

The Longshoremen's Act was patterned after the New York Workmen's Compensation Law. See H. Rept. No. 1190, 69th Cong., 1st Sess. p. 3; Lauzon v. Seamen's I.I. Co., 282 U.S. 168, 208. Since Section 18 of the New York statute provides now, as it did in 1927 when the Longshoremen's Act was enacted, that written notice is excused if the person "having immediate supervision" of the injured employee had knowledge of the accident, the holdings of the New York courts that a

In such circumstances it is not fidelity to be presumed that it was intended to place a burden on employments which non-maritime employers are not forced to assume. Especially is this true where, as here, the burden has no reasonable relation to the contingency and and will serve no other purpose than to defeat claims for compensation arising out of bona fide injuries suffered by employees while acting in the scope of their employment. And, compared to the decisions under those state statutes which have either no express subdivision for workmen aerials or which refer merely to "employer," it would be an ironic twist, indeed, if the designation of "agent in charge" in addition to "employer" were to be held to subtract

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harbormen's hazardous callings for the purposes of the statute are not particularly illuminating. But it should be noted that the difference in terminology between the New York Act and the Longshoremen's Act in this respect was never the subject of comparison, comment, and it therefore may reasonably be inferred that the draftsmen of the latter considered the language of Section 12(d) (1) to cover the employer's immediate supervisor.

Indeed, the court below recognized this on an earlier occasion when it said: (*M.C. Cas. Co. v. Lawson*, 101 F. 2d 732, 733):

> In enacting the Longshoremen's and Harbor Workers' Compensation Act it was clearly the intention of Congress to give the same rights and remedies to those employed in work of a maritime nature as are enjoyed by other workmen under the provisions of state workmen's compensation acts. This act is to be liberally construed to effect its purpose. Baltimore & Philadelphia Steamboat Co. v. Norton, 284, U.S. 408.

Cf. *South Chicago Coal & Dock Co. v. Bassett*, 309 U.S. 251; *Hillcone S. S. Co. v. Stefan*, 126 F. 2d 965 (C.A. 9); *Bassett v. Maarman Const. Co.*, 120 F. 2d 230 (C.A. 8), certiorari denied, 314 U.S. 648.

from the methods by which failure to supply written notice is excused.

Moreover, respondents mistake the rationale employed by the state courts in holding foremen to be the employer's "agent" or "representative" whose knowledge will constitute an alternative to formal notice. These determinations have not been based upon the belief that the State legislatures intended the statutory terms to encompass indiscriminately all minor functionaries in the employer's enterprise, irrespective of their relation to the injured employee. On the contrary, these decisions rest on the same considerations which exist here—namely, that the foreman is the representative of the employer who oversees the rank and file employees and therefore is a person (a) having a substantial opportunity to learn of an injury, by one means or another, and (b) having the duty of reporting his information to the employer. As the Supreme Judicial Court of Massachusetts stated in *Bloom's Case*, *supra* (222 Mass. at 437):

> In the case before us, the foreman * * * appears to have had superintendence over the workmen and their work. While acting within the scope of his duty, he was the representative of the employer most likely to have knowledge, by observation or report, of the frequent injuries to [employees]; and apparently it was his duty to disclose that knowledge to the employer. In the practical working of the statute he was one of the persons, if not the

only one, on whom the employer would depend for information as to injuries to its workmen."[21]

In addition to the jurisdictions expressly holding that a foreman is the "agent" or "representative" of the employer, are those in which it has been simply determined, without the advancement of any particular rationale, that if the foreman is informed of the injury the statutory requirements are met. See, *e.g.*, *Meehan* v. *Crowder*, 158 Fla. 361, 28 So. 2d 495; *Gibbons* v. *United Electric Rys. Co.*, 49 R. I. 353, 138 A. 175; *Beaver* v. *Morrison-Knudsen Co.*, 65 Idaho 275, 41 P. 2d 605; *Clary* v. *Proudfit Co.*, 124 Neb. 582, 247 N.W. 417. Because the Florida statute is, in material part, identical to the Longshoremen's Act (see *supra*, pp. 23-24, n. 16) the *Meehan* case has special pertinence. There, the employee had contracted nephritis while washing a building with a mercury bichloride solution in the course of his employment. He so informed the foreman who had immediate supervision over his

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[21] The same reasoning was employed by the Supreme Court of Iowa. The court said [*Franke* v. *Carpenter*, *supra*, 152 Iowa at 1404]:

> The term [representative] has not been given legislative definition. In the sense that a representative is one who represents another, stands in his place or stead, or acts for him in the capacity of a foreman, Hudson was the representative of [the employer]. As foreman he was such a representative as that it was his duty to at once report the fact that [the employee] met his death * * * and the circumstances surrounding the occurrence. Employees are often in charge of and under the control of a foreman, superintendent, or other agent of the employer. One occupying such a position would obviously be the representative of the employer, within the meaning of [the statute].

work and the latter, believing erroneously that the illness was not the result of an accident, took no action of any kind. Four months later, the employee submitted written notice and thereafter instituted compensation proceedings. In sustaining the sufficiency of the notice to the foreman, the Supreme Court of Florida merely observed [158 Fla. at 365] that written notice is not a prerequisite to the recovery of compensation, citing for this proposition an earlier decision, *Anderson v. Jarrell*, 157 Fla. 212, 25 So. 2d 490. The *Anderson* case had turned on the determination that the employer's "agent in charge of the business in the place where the injury occurred" had knowledge of the injury in question, and consequently the notice provisions had been complied with. It must therefore be inferred that the court in *Meehan* regarded the foreman to be such an agent. In any event, whatever the basis for its decision, the Florida court found no difficulty in concluding that by notifying his foreman that he had been injured, the employee fulfilled his obligation to the employer, even though the foreman, because of a poor exercise of judgment, kept his information to himself. That result is completely consistent with the purposes of the state workmen's compensation acts and the Longshoremen's Act and, in fact, is precisely the conclusion that the deputy commissioner reached in the instant case.

B. *The Knowledge of a Foreman That an Employee Under His Supervision Has Been Injured Is Imputable to the Employer.*

The foregoing discussion is based on the premise that it is essential to the validity of the compensation award that the foreman Wisby was the "agent in charge of the business in the place where the injury occurred" within the meaning of Section 12(d)(1) of the Longshoremen's Act. Actually, even if the foreman was not the "agent in charge," the determination of the deputy commissioner as to notice was correct. For the knowledge that Wisby possessed was, under familiar principles of the law of agency, directly imputable to the employer, or to the "gearman" if he was the agent in charge.

It is long settled that "a principal is charged with the knowledge of [his] agent acquired by the agent in the course of the principal's business." *Curtiss, Collins & H. Co.* v. *United States*, 262 U. S. 215, 222. See also *Mutual Life Ins. Co.* v. *Hilton-Green*, 241 U. S. 613, 622; *Md. Cas. Co. of Balt.* v. *Queenan*, 89 F. 2d 155, 156-7 (C.A. 10); *Restatement of the Law of Agency*, § 272.[22] The

[22] Section 272 of the *Restatement* provides:

> * * * [The] liability of a principal is affected by the knowledge of an agent concerning a matter as to which he acts within his power to bind the principal *or upon which it is his duty to give the principal information.* [Emphasis supplied;

Cf. *Armstrong* v. *Ashley*, 204 U.S. 272; *Fidelity & Deposit Co.* v. *Courtney*, 186 U.S. 342, 363-4; *Railroad Company* v. *Smith*, 21 Wall 255; *Johnston* v. *Laflin*, 103 U.S. 800; *Hoover* v. *Wise*, 91 U.S. 308. That it is of no significance that the

applicability of this rule to the present situation can hardly be questioned. As a general rule, as is the case in regard to this employer's business, the supervisory employee having immediate charge of workmen is under a duty to report, to the employer or an individual designated to receive that information on his behalf, the fact that an injury has occurred. Indeed, it is the unusual enterprise in which the employer will countenance, let alone contemplate, silence on the part of the foreman and other managerial employees in respect to non-routine occurrences within their jurisdiction. In those instances where the employer for some reason withholds some of the responsibilities normally an integral part of the foreman's office, the employees justifiably count on being so informed. Not being clairvoyant, they assume that the foreman is in fact what he appears to be by virtue of the job he holds.[25]

The determination of the court below, that nothing less than the personal knowledge of the employer or his "agent in charge" will suffice, has the effect, in the final analysis, of permitting the

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agent may be a supervisory employee is clear. See, *e.g., New Aetna Portland Cement Co. v. Hatt*, 231 Fed. 511 (C.A. 6); *Anderson Lumber Corp. v. Lehto*, 282 Fed. 486 (C.A. 4).

[25] Respondents have laid considerable stress on the fact that the foremen were not regular employees of the employer, but instead were supplied by the union. But as Judge Rives noted in his dissent in the Court of Appeals: "Irrespective of the manner and duration of their employment, [they] were then employees of [respondent employer] and it was responsible for their acts and omissions within the scope of their employment the same as if they had been selected without the aid of a union and their duties were to extend over years." (R. 245).

employer to take wholly inconsistent positions when he believes it to serve his pecuniary interest. By clothing the foreman with the authority to direct the workmen, and insisting that this authority be respected, the employer insures, insofar as is possible, that the work will be performed both efficiently and expeditiously.[32] Yet when the employees' action in reliance on the representation that the foreman stands in the stead of the employer goes beyond the matter of obedience to the latter's commands, the employer may, under the theory of the court below, repudiate the foreman's status as his agent and insist that the information received by the foreman in the course of the work he supervised was not obtained in the scope of employment.

While such equivocation cannot be justified in any circumstance, it is especially objectionable where notice of the injury actually reaches the person assigned the task of making out injury reports and procuring medical assistance. Although we do not rely principally on the fact that the timekeeper had knowledge (see *supra*, p. 21), since we believe the knowledge of the foreman to be all that the Act requires, it does serve to bring into sharper focus the implications of the position taken by the Court of Appeals. For, if the timekeeper's knowledge was not imputable to respondents (and this is the necessary holding of that court), the em-

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[32] In this case, for example, Wisby had been employed for the express purpose of getting "work out of the longshoremen of his color" (R. 152).

ployer has achieved a total exemption from liability for the misfeasance or nonfeasance of his agents.

As Judge Rives noted in his dissent in the Court of Appeals, the vast majority of those state courts, which, in holding notice to the foreman to satisfy the relevant provisions of the particular workmen's compensation act, do not determine the foreman to be an agent or representative, reach the same result by the means of imputing the foreman's knowledge to the employer. *Triebsch v. Athletic Mining Co.*, 218 Ark. 379, 237 S.W. 2d 26; *Hotel Claridge Co. v. Blank*, 169 Tenn. 575, 89 S.W. 2d 758; *Gulf States Steel Co. v. Christison*, 228 Ala. 622, 154 So. 565; *Colline Oil Co. v. Winters*, 155 Okla. 217, 8 P. 2d 675; *Hartford Accident & Indemnity Co. v. Industrial Commission*, 64 Utah 176, 228 P. 753; *Hutchinson v. Tamboro*, 300 Mich. 597, 16 N.W. 2d 87; *Texas Employers' Ins. Ass'n v. Wonderley*, 16 S.W. 2d 386 (Civ. App. Tex.); *Merritt v. American Stevedores*, 15 N.J. Misc. 710, 195 A. 382; *Uditsky v. Krakowits*, 113 Pa. Super. 166, 2 A. 2d 525; *Fear-Campbell Co. v. Pearson*, 88 Ind. App. 382, 164 N.E. 262; *Taylor v. Missouri P. R. Co.*, 146 Kan. 666, 73 P. 2d 62; *Markoff v. Emeralite Surfacing Products Co.*, 190 Minn. 355, 252 N.W. 429.[*] It is plain from those opinions

[*] The problem of imputation comes up primarily in connection with compensation acts which specify actual knowledge on the part of the employer and make no reference to an agent or representative. Most of the acts under consideration in these cases fall into that category (cf. *supra*, pp. 22-23, n. 16). But in some instances where the governing statute refers to the agent or representative as well, the courts have passed over

which discuss the basis for imputation that the controlling rationale is that (a) the uneducated laborer, to whose benefit compensation statutes are primarily directed, cannot be expected to do more than inform the person with whom he is accustomed to dealing on the employer's behalf, (b) if the foreman has knowledge of the injury it is his duty to convey his information to the employer, and (c) the consequences of his failure to do so are not to be visited upon the employee. See *e.g. Merritt* v. *American Stevedores, supra; Fear-Campbell Co.* v. *Yeariow, supra.*"

In sum, whether placed on the basis that the foreman was the statutory agent, or on the basis that the foreman's information was imputable, the "employer (or his agent in charge of the business in the place where the injury occurred)" had knowledge of the injury to claimant. And the fact that the deputy commissioner did not choose between these alternatives in arriving at this conclusion is of no significance. We have been officially advised

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the precise status of the foreman and have held his knowledge to be imputable to the employer. See, *e.g., Fear-Campbell Co.* v. *Yeariow*, 29 Ind. App. 252, 64 N.E. 252; *Taylor* v. *Missouri P.R. Co.*, 148 Kan. 648, 84 P. 2d 67.

[5] It might be noted that the same course which imputes the foreman's knowledge to the employer refuses to impute the knowledge of persons not having supervision over the injured employee and not having any duties in regard to accidental injuries. See, *e.g., Herbert* v. *Lake Shore & M.S. Ry. Co.* 200 Mich. 366, 166 N.W. 922 (railroad yard switchman); *Walkden's Case*, 237 Mass. 115, 129 N.E. 396 (subordinate of mill overseer); *Indian Creek Coal & Mining Co.* v. *Beach*, 73 Ind. App. 491, 127 N.E. 880 (bookkeeper); *Cuccio* v. *Roberts Contracting Co.*, 204 App. Div. 653, 198 N.Y.S. 613 (bookkeeper).

by the Assistant Solicitor of the Department of Labor in the Employees' Compensation Division that, since the inception of the Act in 1927, deputy commissioners have universally, and as a matter of course, accepted notice to the employee's immediate superior, whether the superior was termed a "foreman" or otherwise, as satisfying the requirements of Section 12(d)(1). Until this case, employers and their insurance carriers have not disputed the correctness of this position and the deputy commissioner here, undoubtedly for this reason and also because of the holdings under comparable provisions in the state acts, did not deem it necessary to spell out the matter in detail."

C. *The Record Supports the Deputy Commissioner's Determination That the Employer Was Not Prejudiced by the Absence of Written Notice*

After finding that the "agent in charge" had knowledge of the injury to claimant, the deputy

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"Contrary to respondents' belief (Br. in Opp. 9), the Court of Appeals for the District of Columbia Circuit did not decide in *Fulton v. Hoage*, 77 F. 2d 110, that a hospital superintendent is not an "agent in charge" within the meaning of Section 12(d) (1). The deputy commissioner had not elaborated on his reasons for rejecting the compensation claim because of the failure to provide timely written notice. The Court of Appeals, in affirming, merely observed (77 F. 2d at 112) that there had been no determination either that the employer had not been prejudiced by the absence of written notice or that for some satisfactory reason written notice could not be given. See *infra*, pp. 42-45. The plain fact is that this is the first case under the Longshoremen's Act in which a compensation order has been challenged on the ground that respondents successfully advanced in the courts below.

commissioner determined that [illegible] had not been prejudiced by the failure to [illegible] ten notice. While respondents did not [illegible] the proceedings before the deputy commissioner that they had been prejudiced by any untimely notice of injury in the district court alleged that there was no evidence to support the deputy commissioner's finding. In their disposition of the case members of the court below passed upon the question of prejudice, however, by respondents in this Court.

Whether or not respondents' failure to assert prejudice in their answer to the compensation claim or at some point during the hearing resulted in a waiver of that defense [*cf. Great Lakes Towing Co. v. McMonigal*, 28 F. Supp. 743 (W.D. N.Y.), affirmed, 102 F. 2d 464 (C.A. 2), certiorari denied, 308 U.S. 570; *Bethlehem Steel Co. v. Parker*, 163 F. 2d 334 (C.A. 4)],[27] there is no substance to their

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[27] Section 20 of the Longshoremen's Act provides that:

> In any proceeding for the enforcement of a claim for compensation under this Act it shall be presumed, in the absence of substantial evidence to the contrary—
>
> (b) that sufficient notice of such claim has been given.

Since the only notice required by his claim that the employee is required to give the employer a date of the injury [pursuant to Section 12(b) [33 U.S.C. 912 (b)] the deputy commissioner is charged with the duty of assuring the employer that a claim has been filed], it would seem that this provision placed the burden on respondents of going forward on the question of prejudice. *Cf. Del Vecchio v. Bowers*, 296 U.S. 280; *Morse Boss v. Cardillo*, 154 F. 2d 387 (C.A. 2). And this construction is given additional support by the fact that the evidence which will either affirm or negate a claim of prejudice is generally within the exclusive possession of the employer. This is especially true where, as here, the employee orally advises a representative of the employer that he has been hurt.

[illegible] The fact that claimant's injury was known to the foreman and to those in the immediate vicinity [illegible] a sufficient basis for the [illegible] determination that the want of written notice was not prejudicial. It will rarely be necessary to say that they did not personally [illegible] of the injury. But any prejudice [illegible] from this cannot be presumed [illegible] circumstances or written notice. The record is devoid of anything to suggest that had written notice been submitted, respondents' opportunities to investigate the circumstances of the injury would have been any greater than if the timekeeper had performed his function of making out an injury report and placing it in the proper hands. Cf. *Okimoto Boiler Works* v. *McMonigal*, 68 F. Supp. 687, 688 (W.D.N.Y.); *Matter of Hughes* v. *St. Patrick's Cathedral*, 245 N.Y. 201, 156 N.E. 665; *General Cable Corp.* v. *Lesins*, 124 N.J.L. 225, 11 A. 2d 81.

Respondents' view that, as a matter of law and irrespective of the circumstances of the particular case, the absence of written notice is to be deemed prejudicial unless the employer is personally informed of the injury has been rejected by several state courts. See, *e.g.*, *Barnes Oil Co.* v. *Sullivan*, 203 Okla. 541, 223 P. 2d 709; *Schreibauer* v. *Schneider Engraving Product, Inc.*, 224 Mo. App. 304, 25 S.W. 2d 529; *Clayton* v. *Hercules Mining Co.*, 64 Idaho 34, 127 P. 2d 767; *Finch* v. *Buffalo Envelope Co.*, 218 App. Div. 31, 217 N.Y.S. 744, affirmed,

244 N.Y. 307, 155 N.E. [illegible], as [illegible] the case [illegible] [illegible] [illegible]

[redacted]

[illegible] and (c) that the men were preoccupied with their own affairs to escape from the vessel's hold. Moreover, these claims were not substantially inconsistent, nor did they vary any more than do normal eye-witness reports immediately following an accident. What is of significance is that there was nothing in the testimony of the other longshoremen which in any way discredits the statements of the gang foreman based on personal observation after the excitement and confusion had somewhat subsided, that claimant actually had been hurt in the course of his employment (R. 138)."

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* As hereinafter noted (pp. 11-12, supra), the ruling of long experience is limited (a) to cases that involve the duty of prompt and effective action and (b) where the employer has the opportunity of minimizing injuries by providing prompt medical treatment. Insofar as the latter is concerned, it is impossible to determine on the basis of this record whether the claimant's disabling spinal injury had been aggravated if he had been given medical treatment immediately. In any event, under Section 7(c) of the Longshoremen's Act (33 U.S.C. 907 (b)) employers have a duty on the employee to provide medical treatment where the injured person is unable to do so, and such duty cannot be delayed or denied on the ground of preexisting disease.

Nor is there any merit in the argument by the employer that because Section 7(d) expressly refers to employees as "the superintendent or foreman" (Section 33, which does not use this long phrase, seems to be said to exclude the superintendent or foreman from the ambit of "agent in charge"). In the first place, as Judge Rifkind pointed out, it is completely inconsistent with the purposes of the Act to assume that Congress "intended any such fine upon technical distinctions" (R. 248)—which would result in the knowledge of the foreman being sufficient for medical purposes, but not for compensation purposes. In the second place, if it is assumed that the choice of terms was advertent, then the distinction may be readily explained by the difference in the powers of an agent, as they were understood at common law at the time of the passage of the Act. Thus, it was generally held that a foreman had no authority to authorize medical services, as a consequence of the nature of his powers and duties, for an injured employee. See Note, 71 A.L.R. 638, and cases

It thus follows that even if, despite our argument, the failure of the timekeeper to notify the employer is to be charged to the employer, the findings of the hearing commissioner that the employer was not prejudiced by the absence of written notice must be accepted. The record will at least support the inference that had the employer promptly investigated in person, their ability to defend against the claim at the compensation hearing would not have been improved. The reviewing court, therefore, can "set aside that inference because the opposite one is thought to be more reasonable; nor can the opposite inference be substituted by the mere reasons of a belief that the one chosen by the Deputy Commissioner is factually questionable." *Cardillo v. Liberty Mutual Co.*, 330 U.S. 469, 477-8. See also *Norton v. Warner Co.*, 321 U.S. 565; *Davis v. Department of Labor*, 317 U.S. 249, 256; *Parker v. Motor Boat Sales*, 314 U.S. 244, 246; *South Chicago Coal & Dock Co. v. Bassett*, 309 U.S. 251, 257-258; *Del Vecchio v. Bowers*, 296 U.S. 280, 287; *Voehl v. Indemnity Ins. Co.*, 288 U.S. 162, 166.

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cited, 642-645, 651-655 (1921). It might well have been that Congress, in designating the foreman or superintendent, was deliberately imposing upon the employer this duty. On the other hand, no such specific designation was required in Section 12, which was resolving a statutory procedural problem in accordance with well-established rules of agency regarding an employer's *knowledge* of an injury.

II

In Excusing Claimant's Failure to Submit Written Notice, the Deputy Commissioner Did Not Abuse the Discretion Vested in Him by Section 12 (d) (2).

The deputy commissioner did not limit himself to the determination that the timely oral notice to the foreman Wisby brought the case within the provisions of Section 12 (d) (1) of the Longshoremen's Act. Pursuant to the discretion vested in him by Section 12(d)(2) of the Act, he excused the failure to give written notice, setting forth several reasons, which he considered satisfactory, as to why "it could not be given". They were, *inter alia*, (1) that claimant was almost wholly illiterate and was not a regular longshoreman; (2) that claimant knew of no representatives of the employer other than the foreman who supervised him; (3) that the employer had given no specific instructions to the longshoreman as to whom to report an injury; (4) that claimant was not acquainted with the requirements regarding notice; and (5) that a verbal report to the foreman was the usual method of informing this employer that an accidental injury had been suffered (R. 58-60).

The Court of Appeals held that these reasons were "not reasons at all [but] mere excuses on grounds which the statute does not define as excuses" (R. 244). While the court did not give any definite indication as to what it would have regarded as a "satisfactory reason," the objection it raised to those assigned would seem to suggest that it deemed indispensable a finding that claimant's

disability rendered him physically incapable of submitting written notice. For the statute does not detail the particular circumstances in which the deputy commissioner may act under Section 12 (d)(2), and it would be only where there was total incapability that, in the most literal sense, written notice "could not be given." But whether or not the court had such a standard in mind, its conclusion that the deputy commissioner abused his discretion was patently erroneous.

1. Underlying the position of the court below is the assumption that the deputy commissioner's discretion in respect to excusing the timeliness of written notice must be narrowly restricted if Section 12 is to have any meaning. We believe that assumption to be groundless; indeed, it is the very grant of broad discretion to the deputy commissioner which provides the flexibility in administration essential to the successful operation of legislation of this character and which makes Section 12 consistent with the statute taken as a whole.

What the court failed to recognize is that the notice provisions, as well as the other parts of the Act, are nothing more than means to the statutory end of shifting the burden of industrial accidents from the victims to the consumer public. No doubt that end is not served if workmen's compensation is allowed to become a convenient avenue for the practice of fraud upon employers and their insurance carriers. But neither is it served by blind and unswerving adherence to a particular formula for the prevention of deception, with no

allowances to be made for the circumstances of the individual case. The plain fact is that the absence of strict compliance with a statutory requirement, whether it be a matter of written notice or otherwise, does not necessarily mean that the claim is fictitious or that there was a lack of diligence; it may mean simply that the situation confronting the claimant at the time he was injured was such that he could not reasonably have been expected to do more than that which was done.

Section 12(d)(2) therefore represents the legislative awareness that, when assessing the consequence of a failure to submit written notice, the cause of that failure must be taken into consideration if the legitimate interests of both the employer and the employee are to be protected. Moreover the Section, on its face, makes it clear that the deputy commissioner has been delegated the responsibility of determining whether the record discloses a satisfactory reason for the absence of written notice. Indeed, the latitude of the notice requirement is strikingly indicated when Section 12(d)(2) is compared to Section 13(a), which provides that a claim for compensation must be filed within one year after the injury, and as to which a failure to file is non-excusable. *Pillsbury* v. *United Engineering Co.*, 342 U.S. 197. As the Fourth Circuit observed (*Bethlehem Steel Co.* v. *Parker*, 163 F. 2d 334, 336):

> [The] wording of the Act, its purposes and its history, make it quite clear that the power of the deputy commissioner to excuse the timeli-

ness of the notice (as distinguished from the sheer failure to give any notice whatsoever) are very broad. This power is given by the Act in wide, general terms, and can be exercised by the deputy commissioner "for some satisfactory reason." Manifestly the decision of what reasons are, and what reasons are not, satisfactory, is left to the deputy commissioner. The Act sets out no principles, no standards, to guide the deputy commissioner in making this decision.

Cf. *Hoage* v. *Royal Indemnity Co.*, 90 F. 2d 387 (C.A. D.C.); *Hoage* v. *Employers' Liability Assurance Corp.*, 64 F. 2d 715 (C.A. D.C.); *McTaggert* v. *Lowe*, 69 F. Supp. 101 (D. N.J.).[**] And the New York courts, in decisions prior and subsequent to 1927, have interpreted an identical provision in Section 18 of the New York Workmen's Compensation Law in the same fashion. See *e.g.*, *Lawson* v. *Wallace & Keeney*, 239 N.Y. 549, 147 N.E. 186; *Carbino* v. *De Grasse Paper Co.*, 209 App. Div. 627, 205 N.Y.S. 337; *Gubin* v. *Leon Lederman*, 257 App. Div. 1091, 14 N.Y.S. 2d 664; *O'Neil* v. *Kirkman & Son*, 248 App. Div. 930, 290 N.Y.S. 274; *Lissak* v. *Une Petite Maison*, 252 App. Div. 710, 298 N.Y.S. 895.

[**] In *the Bethlehem Steel* case, written notice was excused for the reason that claimant had not realized *ab initio* the seriousness of his injury; in *Royal Indemnity* and *Employers' Liability Assurance Corp.* for the reason that claimant did not perceive the nature of his disability and its relation to his employment. Since respondents tacitly admit that these reasons form a sufficient basis for the deputy commissioner's exercise of discretion (Br. in Opp. 23), it is difficult to see how they can seriously challenge the excusing of notice here.

2. Taken as a whole, the reasons given by the deputy commissioner make it plain that there was no abuse of discretion. On the contrary they are, as Judge Rives put it, "compelling reasons" why written notice could not be given (R. 249).

Respondents and the court below have stressed the deputy commissioner's reference to claimant's illiteracy and his unawareness of the written notice provisions of the Longshoremen's Act. In doing so, however, they ignore other equally significant findings, amply supported by the record, which indicate that claimant had every reason to believe that the oral notice to his foreman was the full measure of his responsibility to the employer. Respondents, who must have been cognizant of the limited education and intelligence of the average longshoreman—and the claimant was not even a regular longshoreman—never even attempted to inform the men working aboard the *Southern States* that it was incumbent upon them to follow any formal reporting procedure in the event of an accident resulting in personal injury. Furthermore, they acquiesced in, if not actually encouraged, the practice whereby the men notified their foreman

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For the ultimate consideration in each instance has been that, while there was no physical barrier to the submission of written notice, the claimant could not, as a practical matter, have been expected to meet the terms of Section 12 (a). Most other state workmen's compensation acts vest similar discretion in the individual or board charged with their administration. As observed by one writer: "On the whole, the provisions of most of the compensation statutes in this country are broad in excusing failure of notice, and the interpretations given by most courts to these provisions have also been liberal toward the injured employees." Dodd, *Administration of Workmen's Compensation* (1936), p. 126.

(or the timekeeper at the latter's direction) and let the matter rest at that point.

Thus, the amended compensation order cannot be taken as excusing timely notice on the sole ground that claimant was ignorant of the terms of the Longshoremen's Act. The short of the matter is that respondents by their own conduct invited an absence of written notice. There is therefore a hollow ring to the complaint (Br. in Opp. 23) that the deputy commissioner's discretionary act, if sustained, would vitiate the notice provisions of the statute. In other circumstances, the deputy commissioner might well have determined that no satisfactory reason existed for claimant's failure to provide written notice. No such determination could reasonably be made on this record."

"At the conclusion of the majority opinion in the court below, Chief Judge Hutcheson makes reference, with apparent approval, to the fact that a "somewhat analogous" provision in the Texas Workmen's compensation statute has been judicially interpreted to authorize the excusing of the lack of written notice where the cause "would be considered a reasonable excuse for not filing the *claim by a man of ordinary prudence who is reasonably mindful of his own interests.*" (R. 245.) The Texas courts mean, however, a man of ordinary prudence *"similarly situated"*. *Traders & General Ins. Co.* v. *Jaques*, 131 S.W. 2d 133 (Civ. App. Tex.). Cf. *Williamson* v. *Texas Indemnity Co.* 127 Tex. 71, 90 S.W. 2d 1088. We see nothing in any of the state decisions under the Texas Act to suggest that, as a matter of law, the reasons assigned here by the deputy commissioner would be deemed insufficient.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the judgment below should be reversed.

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